The accused is presumed by law to have known because he is the occupier. The opium was in the drawer. Either it belonged to the accused, in which case it was in his possession, or it belonged to one of the assistants, who kept it there, to his presumed knowledge.

That, however, does not mean that the opium was in the control of the accused. The Deputy Public Prosecutor said that the accused, knowing the opium was there, could order the assistant concerned to throw it away. That may be true but it sets up control of the assistant, not control of the opium.

This raises a point which, so far as I know, has not been examined in any written judgment. The terms possession, custody, control and power of disposal must have the same meaning whether the goods are innocent or contraband. The argument is that because the accused knew the stuff was opium, he could order the assistant to throw it away and therefore he had control. I think this is fallacious. Control must be proved as a fact and it must arise from the relation of the person to the goods, irrespective of whether they are contraband. An example may make this clearer. Suppose that one of the assistants in this case smoked a particular brand of tobacco, not sold in the shop and, to the knowledge of the accused, kept it in that drawer. No doubt the accused could, at any time, tell the assistant to keep his tobacco somewhere else. He could resume possession of drawer. But so long as he allowed the assistants to keep their small personal things in the drawer, the things were in their control, not his. He could not reasonably order them to throw away harmless tobacco, consistently with the existing arrangement. The argument for control is based solely on the contraband nature of the thing — not on the circumstances in which it was kept.

A similar point was raised in a recent unreported case. A lorry driver was convicted of possession of opium. It was clear that he was conveying the opium for another man who did not travel on the lorry. On appeal it was contended that he had disposing power because, if he had driven to some other place and sold the opium for his own account the guilty consignor could neither have sued nor prosecuted. This is not correct. Any dishonest carrier or warehouseman can sell the goods entrusted to him but if he does so he first converts his original custody into possession. The elements of possession are the same, whether the possession be innocent or criminal. Honesty is a matter of intention which, as I have said, is not one of the elements. As there was clear evidence that the driver knew the stuff to be contraband it was a case of a bare carrier with guilty knowledge. His conviction for possession was quashed but on the same findings of fact a conviction for abetment of possession was substituted.

In the present case the evidence, with the aid of the presumption of knowledge, does not show more than that the accused tolerated the concealment of the opium, by another person, in a drawer of which he had control. Control raises a question as to the presumption that the accused had possession but, apart from his own evidence, the circumstances show possession by one person and are equally consistent with the possession being that of one of the assistants. This presumption therefore does not operate. Apart from this presumption, however, the facts raise an inference that the accused abetted the possession by an assistant.

This I think is the true view of the case. At the close of the prosecution the accused should have been recharged in the alternative, with either possession or abetment. Both would have depended on the presumption of knowledge from occupancy. The accused would have had only to rebut the presumption that he knew of the concealment. In that situation however, there would have been a doubt as to which of two offences, if either he had committed. His burden would have been lighter. Also, as I have said, the Magistrate misweighed his evidence.

There was material on which he might have been properly convicted but it requires a view of the facts and the law which was not submitted by the Crown either at first instance or on appeal and which the accused might have been able to rebut. It is not a case for retrial.

The appeal is allowed.

Appeal allowed.

Solicitors for the appellant: *Allen & Gledhill.*

PUBLIC PROSECUTOR v. LIEW WAI HING (f)

[A. Cr. J. (Buhagiar J.) December 2, 1955]

[K. L. — Criminal Appeal No. 77 of 1955]

Road Traffic — Motor Vehicles (Registration and Licensing) Regulations, 1954, reg. 19(2) — Using a motor vehicle for a purpose other than the purpose for which a licence is granted — Burden of proof.

The appellant in this case was charged as follows: "That you at about 11.10 a.m. on 18.8.55 at 3¾ mile Ipoh Road, Kuala Lumpur, State of Selangor, being the registered owner of motor vehicle BC 197 did cause the use of the said vehicle on the public roads for a purpose other than the purpose for which the licence was granted, in that the said vehicle was used for the carriage of goods, namely, equipments for a mobile cinema, and you thereby have committed an offence against Regulation 19(2) of the Motor Vehicles (Registration and Licensing) Regulations — LN. 686/54 and punishable under Regulation 50(a) of the said Regulations."

The prosecution called two witnesses. The 1st an Enforcement Officer testified that he stopped and checked the motor vehicle in question, that he found the vehicle was loaded with various articles and that the vehicle

displayed on its windscreen a current motor vehicle licence which showed that the vehicle was licensed as a private motor passenger vehicle. The 2nd witness, a Registration Clerk, testified that the motor vehicle in question was registered in the name of the respondent as a private passenger vehicle. At the close of the case for the prosecution the learned Magistrate holding that he was bound by the case of **Public Prosecutor v. Sundram**[1] upheld a submission that there was no case to answer.

Held: (1) the question in issue in this case was the existence of the licence for a particular purpose and the burden of proving that the respondent had a licence for the particular purpose was on her; (2) the learned Magistrate failed to take into consideration the provisions of para. (7) of reg. 19 of the Motor Vehicles (Registration and Licensing) Regulations, 1954 which is not contained in the regulations under which the accused in the cases of **Sundram**[1] and **Ong Kim Piew**[2] were charged.

Cases referred to :—

(1) *Public Prosecutor v. Sundram* (1955) M.L.J. 159.
(2) *Ong Kim Piew v. Public Prosecutor* (1949) M.L.J. 137.
(3) *John v. Humphrey* (1955) 1 All E.R. 793.
(4) *R. v. Oliver* (1944) 1 K.B. 68.
(5) *McLeod (or Houston) v. Buchanan* (1940) 2 All E.R. 179.

CRIMINAL APPEAL.

Buhagiar J. : — This is an appeal by the Public Prosecutor from an order of the Magistrate in the Kuala Lumpur Magistrates' Court acquitting and discharging the respondent on a charge for the offence contrary to Regulation 19(2) of the Motor Vehicles (Registration and Licensing) Regulations, 1954 (L.N. No. 686 of 1954) and punishable under Regulation 50(a) of the same Regulations.

The facts are as follows :—

On 18th August 1955 at about 11.10 a.m., an Enforcement Officer of the Road Transport Department, Kuala Lumpur (P.W. 1.) stopped and checked motor van No. BC 197, driven by one Chanchel Singh at the 3¾ mile Ipoh Road. On board the said van were found the following articles:—

(1) Portable Electric generator; (2) Motor car battery; (3) a Cinema projector; (4) a loud speaker housed in a metal box; (5) on roof of van were carried several lengths of steel tubings; (6) an oil drum.

It was also found that on the windscreen, the vehicle displayed a current motor vehicle licence which shewed that the vehicle is licensed as a private motor passenger vehicle.

On these facts the respondent was charged as follows :—

"That you at about 11.10 a.m. on 18.8.1955 at 3¾ mile Ipoh Road, Kuala Lumpur, State of Selangor, being the registered owner of motor vehicle BC. 197 did cause the use of the said vehicle on the public roads for a purpose other than the purpose for which the licence was granted, in that the said vehicle was used for the carriage of goods, namely, equipments for a mobile cinema, and you thereby have committed an offence against Regulation 19(2) of the Motor Vehicles (Registration and Licensing) Regulations — LN. 686/54 and punishable under Regulation 50(a) of the said Regulations."

Two witnesses gave evidence for the prosecution. P.W. 1, the Enforcement Officer testified that he stopped and checked the motor vehicle, that he found the vehicle was loaded with the articles above mentioned and that the vehicle displayed on its windscreen a current motor vehicle licence which showed that the vehicle was licensed as a private motor passenger vehicle. P.W. 2, Registration Clerk attached to Office of Registrar & Inspector of Motor Vehicles, Selangor, testified that the motor vehicle in question was registered in the name of the respondent as a private passenger vehicle.

At the conclusion of the case for the prosecution the learned Magistrate upheld a submission that there was no case to answer. He relied on the case of *Public Prosecutor v. Sundram*[1] which followed *Ong Kim Piew v. Public Prosecutor*[2]; these were cases where the accused were charged with using or permitting or causing to be used motor vehicles in contravention of conditions contained in a permit and it was held that secondary evidence was not admissible to prove the contents of a permit unless the provisions of section 66 of the Evidence Ordinance, 1950, have been complied with.

The main ground of appeal was that the onus of proving that the vehicle was properly licensed was upon the respondent, and on appeal the learned Deputy Public Prosecutor relied on *John v. Humphrey*[3].

There is no doubt that if the statute provided that no vehicle is to be used unless it is licensed, then on a charge of using a vehicle without a licence, on the authority of *Rex v. Oliver*[4] and under section 106 of the Evidence Ordinance, 1950, the burden of proving the fact that the vehicle is licensed is upon the accused. In the present case the learned Magistrate laid stress on the form of the charge that is the words "did cause the use of the said vehicle on the public roads *for a purpose other than the purpose for which the licence was granted*" and considered that the cases of *Public Prosecutor v. Sundram*[1] and *Ong Kim Piew v. Public Prosecutor*[2] were binding on him on the ground that although these cases were decided in respect of a permit, a permit was analogous to a licence. There are two reasons why the learned Magistrate was wrong in his conclusion: firstly the learned Magistrate failed to distinguish the facts in the cases by which he felt bound and the facts in the present case; in the former case it was essential for the prosecution to prove the contents of the permit

that is the conditions to be complied with in the use of the permit while in the present case it was the *existence* of licence for a particular purpose which was at issue. In the present case there was sufficient *prima facie* evidence adduced by the prosecution that the respondent was not in possession of the right licence and the burden of proving the existence of the licence for a particular purpose was on the respondent.

Secondly, the learned Magistrate has overlooked the provisions of paragraph (7) of Regulation 19 of the Motor Vehicles (Registration and Licensing) Regulation, 1954, a provision which is not contained in the regulations under which the accused in the cases of *Public Prosecutor v. Sundram*[1] and *Ong Kim Piew*[2] were charged.

In view of the above, the prosecution had fully discharged the burden placed upon it and on this point the learned Magistrate was wrong in holding that there was no case to answer. On this ground the appeal must succeed.

The learned Magistrate, however, also pointed out that the charge against the respondent is that she "caused" the use of the motor vehicle for a purpose other than the purpose for which the licence was granted and found that there was no evidence that the respondent did "cause" the vehicle to be so used. I agree with that finding. If the learned Magistrate had not come to the wrong conclusion on the question of evidence he might have considered amending the charge to one of "permitting" under the same provision of law as the original charge. In view of the authority in *McLeod (or Houston) v. Buchanan*[5] I think there is sufficient evidence to support a charge of "permitting."

The learned Deputy Public Prosecutor, however, informed me that the object of the appeal was to have a ruling on the burden on the prosecution in such cases, he was not pressing for further proceedings.

I will not therefore interfere with the order made by the learned Magistrate.

No order.

CHAN CHUN LING & ANOR. v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Wilson and Good JJ.) December 12, 1955]

[K. L. — F.M. Criminal Appeal No. 51 of 1955]

Penal Code ss. 34 & 302 — Murder — Common intention.

This was an appeal against the conviction of the appellants on the charge of murder. One of the grounds of appeal was that the prosecution had failed to establish beyond reasonable doubt a common intention between the 1st and 2nd appellants to kill. It was submitted that the evidence tended to show that the pre-arranged plan was to rob the deceased and not to kill him.

Held: on the facts there was an inevitable inference that there was a pre-arranged plan to effect the robbery by killing the deceased and therefore the appellants were rightly found guilty of murder.

Case referred to:—

(1) *Mahbub Shah v. King-Emperor* 72 I.A. 148.

COURT OF APPEAL.

R. Ramani and *Ng Ek Teong* for the 1st appellant.

R. P. S. Rajasooria and *Eugene Lye* for the 2nd appellant.

E. Brown (Federal Counsel) for the respondent.

Mathew C.J. (delivering the judgment of the Court) — The two appellants in this case were convicted of the murder of one Yap Kon Shin who, on the day of his death, was a cashier in the employ of Wearne Brothers Ltd., Kuala Lumpur, and was on his way in the first appellant's car to pay money and cheques into the Bank. The second appellant was a passenger seated in the back seat of the car.

The first appellant stated in evidence that a plan had been made by him and the second appellant for the second appellant to hold-up both the deceased and himself and then to rob the deceased. The evidence can leave no doubt that in fact the deceased was murderously assaulted by the second appellant, and that the appellants together disposed of the body in a drain on the Sungei Besi Road and hid any articles of clothing on which there were blood-stains. The cash and cheques were taken by the first appellant and a small sum of money was given by him to the second appellant.

The only point of substance which has been argued on behalf of the second appellant is that at the end of the case for the prosecution the learned trial judge should not have called on the second appellant to enter upon his defence. The prosecution evidence against the second appellant may be summarised as follows:—

1. P.W. 16 stated that the first appellant in the presence of the second appellant told him that he wanted to hire a car to carry a corpse.
2. When arrested, the first appellant was in possession of the second appellant's identity card.
3. The second appellant took the Investigating Officer P.W. 19 to a rubbish dump off the Sungei Besi Road, where a handkerchief of the first appellant (Ex: P 32) and a cheque (Ex: P 33) which had been in the possession of the cashier on 10th February 1955 were found.
4. In the Lake Gardens, P.W. 19 found a pair of trousers which had been given to the second appellant by P.W. 21; there were human blood-stains on these trousers.